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Wendell Phillips

SENATE..... .....No. 21.

PRELIMINARY REPORT

OF THE

COMMISSIONERS

ON

CRIMINAL LAW.

4264.55 (22)

MESSAGE.

To the Senate, and
House of Representatives:

I transmit to the Legislature, a letter from the chairman of the Commissioners appointed in virtue of a resolve of the 10th of March, 1837, "to reduce so much of the Common Law of Massachusetts, as relates to crimes and punishments, and the incidents thereof to a written and systematic code," accompanied with a preliminary report of the Commissioners, setting forth the principles and method pursued by them in executing their important trust, and presenting a specimen of the work.

Owing to the length of this report, it is transmitted in the original to the Senate, with the respectful request, that it may be communicated to the other branch of the Legislature.

EDWARD EVERETT.

Council Chamber, 4th Feb. 1839.

BOSTON, *February* 1, 1839.

To His Excellency, EDWARD EVERETT,

SIR :—I herewith transmit to your Excellency the Preliminary Report of the Commissioners for reducing so much of the Common Law as relates to crimes and punishments, and the incidents thereof, to a written and systematic code.

In behalf of the Commissioners,

I am, very respectfully,

Your obedient servant,

WILLARD PHILLIPS.

To the Senate and House of Representatives of the Commonwealth of Massachusetts, in General Court assembled:

The commissioners, appointed "to reduce so much of the common law of Massachusetts, as relates to crimes and punishments, and the incidents thereof, to a written and systematic code," submit the following preliminary

REPORT:

The commissioners applied themselves to the work committed to them, early after their appointment, and have continued to devote themselves to it as assiduously as they have found it practicable to do; and recently have been able to bestow upon it more of their attention, and more effectively, than in the early stages of their labors. They deemed a preliminary examination of the criminal law, generally, to be absolutely essential to the forming of a plan which should meet the views of the legislature. In this part, they found their labors more difficult, and felt the responsibility to be the more pressing, since among the codes and systems of criminal law that have been published, they did not find any one that was satisfactory to them, as a model, or that seemed to them to correspond to the intentions of the legislature,

or that was sufficiently well adapted to the condition of our jurisprudence and the habits of our community. The precise form they have adopted, they will explain more particularly in a subsequent part of this report. When they had substantially agreed on the form to be adopted for the code, and proceeded to construct parts of it, many subordinate questions arose, which required much discussion and consideration, and which must be settled as they arose, since otherwise the different members could not work in concert, and the results of their labors would not be of a homogeneous character. Besides the difficulties and the labor of the work itself, the legislature will readily suppose, that the commissioners found other hindrances to their progress in private duties and engagements and circumstances, which it was quite out of their power to avoid. And though it is incomparably more material what shall be reported, than whether it shall be reported at a little earlier or later period, still the commissioners consider themselves to be pledged to keep the important work entrusted to them constantly in view, and to use their utmost endeavors to bring it to a completion, as rapidly as the great labor and difficulties it involves, and the incidental interruptions and delays, which cannot be avoided, will permit.

It will be apparent that the work is of a nature, which does not admit of the completion of any part, until the whole ground has been explored, and, at least, the materials collected and arranged for every other ; since each part must be framed in reference, and be adapted to the others. The code will consist of, first, the provisions relating to crimes and punishments generally ; secondly, the definition and description of particular crimes

and their punishment; thirdly, procedure; fourthly, pleadings, and fifthly, evidence. The part, naturally first in order in the execution of the work, is the definition and description of crimes; in digesting and preparing the different titles of which, however, it is also requisite to collect and arrange the materials for the other parts of the code relating to these same titles, since the materials for the different parts of the code, in relation to any particular subject, are more or less connected and blended together in the books. The more important, extensive, and difficult titles have been first undertaken; such as treason, homicide, burglary, robbery, larceny, perjury, libel and arson, most of which have been written out, and much progress has been made in the others.

These titles, it will be seen, on reference to the books, occupy a proportionally great space in the body of the criminal law; and, in preparing these, the commissioners have incidentally done much towards the others. Still, until the whole ground has been gone over, it is not possible to estimate what proportional part of the labor has been accomplished; nor even then, until, by comparison of opinions and deliberate discussion, by the whole board, upon each proposition, successively, in some of the articles, it shall appear how great will probably be the labor of finishing the various parts, and putting them in a state, in which the commissioners shall deem them worthy to be submitted to the legislature. For these reasons, they cannot, at present, fix upon a time when the code may probably be reported.

The object of the present report is, to submit a specimen of the plan, and to state what the commissioners

understand to be the leading objects in view in providing for the proposed work. And, in so doing, they will necessarily at the same time state the leading principles upon which they are proceeding in its execution, that the legislature may thus have the means of forming an opinion of the proposed plan of the work; and of correcting any misapprehension, into which the commissioners may have fallen; and may give them any further instructions respecting it, that may be deemed expedient.

The resolve, under which the commission is constituted, directs the commissioners "to reduce so much of the common law of Massachusetts, as relates to crimes and punishments and the incidents thereof, to a written and systematic code, specifying separately such alterations and amendments therein as they may deem expedient."

By the description "common law," the commissioners understand to be intended the unwritten law, in the broadest sense of the expression, as distinguished from written or statute law. To ascertain, then, how much of the entire law of crimes and punishments is to be reduced to a code, it is necessary, first, to ascertain to what extent each title of the criminal law has been covered by the statutes. And, in doing this, the revised statutes afford very great assistance; since if the statute law had remained in the state in which it was before its revision, in 1836, the first step for the commissioners would have been the laborious process of collecting, digesting, and arranging the scattered provisions of the statutes, and embodying them in a form like that in which they are now presented.

On examining the statutes, it will readily appear that

they contain provisions respecting the greater part of the offences known to our jurisprudence, but not all of them; for, there are some classes of offences now punishable in this commonwealth, which are no where mentioned in the statutes. And, in relation to those which are so introduced, the provisions are much more full in respect to some than in respect to others. If we may suppose the whole law, then, statute as well as common, to be represented by a chart, similar to the historical charts often met with, the statute law occupying one side, and the common law the other, we should see some break in the statutory part, where a class of offences is wholly omitted, as, for instance, conspiracy; and, in others, we should see chasms, where some particular species or variety of a class is wanting; and the statutory portion would in some titles extend a very little breadth, and, in others, a much wider breadth, in comparison with the common law, so that the two would be divided by a very irregular boundary.

Again, in some cases, the statutory provisions are comparatively concise; and though they may cover the whole breadth of the offence, as known to the unwritten law, or be so worded as to exclude any wider extension of the offence beyond the provisions of the statutes; yet they are so general in their terms, as in fact to leave every thing within their limits to be settled by the unwritten law. Thus, when the statute law forbids "murder," it is necessary to resort to the common law to ascertain the meaning of the prohibition. And where an act is forbidden, if done "feloniously," we cannot know distinctly what act is thus prohibited, until we

ascertain from the common law the meaning of the word "feloniously."

We resort to the common law, then, for two distinct purposes; the one to find prohibitions and rules independent of the statutes, the other to find definitions, expositions, and illustrations of the language and provisions of the statutes. The unwritten law thus consists of portions that are quite distinguishable from each other in this respect, and the distinction needs to be borne in mind in discussions and theories respecting written and unwritten law; for, the question, whether it is expedient that the written law should define a particular crime and assign its punishment at all, or leave it to the unwritten law, and the other question, how particular and precise the definition should be made, are very different, and the reasons for or against, in regard to one, do not apply in the same way, and with the same force, in respect to the other. This distinction is the more particularly noticed, as it has a bearing in relation to the proposed plan of the code.

The question then arises, of what does the common law of this commonwealth consist? And the answer will present a cogent argument in favor of reducing it to a written law, and give some idea of the labor and difficulties attending the undertaking.

The constitution* provides, that "all the laws which have been adopted, used, and approved in the province, colony, or state of Massachusetts Bay, and usually practised on in the courts of law, shall still remain and be in force, until altered or repealed by the legislature; such parts only excepted, as are repugnant to

* Chap. 6th, art. 6th.

the rights and liberties contained in this constitution." What then were the laws, which had been theretofore adopted, used, approved, and practised on in the courts of law? As far as the English law is concerned, it has been held by the supreme court,* that the early emigrants to this country brought with them "the common law of their native country, as it was amended and altered by the English statutes in force at the time of their emigration," "except such parts as were judged inapplicable to their new state and condition."

Now, as very many of the English acts of parliament in relation to crimes and punishments were amendments of the common law, the result is that the mass of the written and unwritten criminal law of England was, by the above article of the constitution, adopted in Massachusetts, except those parts which were inapplicable to the condition of the country, and those which had been superseded by our own legislation or were repugnant to the constitution. To ascertain, then, what our unwritten law of crimes and punishments is, we have to ascertain what was the written and unwritten law of England, in the early part of the seventeenth century. And, to do this, we must resort to English publications down to the present time, as there has never been any legislative declaration, or any publication in this commonwealth, distinguishing through all the branches of the English criminal law what part of it is in force in this state.

But, though the statute laws of England down to the

* Commonwealth *v.* Knowlton, 2 Mass. Reports, 534; Commonwealth *v.* Leach and others, 1 Mass. Reports, 61; Sacket *v.* Sacket, 8 Pickering's Rep. 59; Report of the Commissioners on the practicability and expediency of codifying the common law, 1836.

period of emigration, in amendment of the common law of crimes and punishments, as far as they were applicable and have not been superseded by the constitution or by legislation, are thus considered to be a part of the unwritten law of the state, yet those statutes have, on the whole, occupied but little space in our jurisprudence, as far as relates to the description of crimes and designation of punishments, having, in these respects, been mostly superseded; still it cannot be said with confidence, that no such part of the criminal law of this commonwealth does not now, through the provision of the constitution cited above, depend directly and solely upon some act of parliament, which has been repealed in England more than two centuries; because it is not easy to say, what law might or might not be adjudged to be applicable to the condition of the country. A forfeiture of land on account of waste, as has been adjudged,* was liable to be incurred on an English statute, dating more than four centuries back, and which was not known to have been, previously, actually adopted and acted upon in our jurisprudence. It is presumed, however, that in stating the existing unwritten criminal law of this commonwealth, it is not requisite to explore the obscure recesses of the English statutes at large, previous to the seventeenth century, to find what odd sections and shreds of them have not been superseded or are not applicable; but that they may be passed by, except in cases, where the common manuals and digests may point them out as subjects of consideration. And if there is danger of any obsolete unknown law, not mentioned in them, springing up from

* Sacket *v.* Sacket, 8 Pickering's Reports, 59.

the mists of antiquity, the better way would seem to be to provide against it by a legislative act, abrogating such laws, when not supported by actual adoption in our jurisprudence or by other authority.

Accordingly, as far as the English law is concerned, the principal labor in the work in hand is to produce in a distinct form so much of the unwritten part of it, as is also part of the common law of Massachusetts. And the inquiry necessarily arises, what constitutes the common law of England. Sir William Blackstone says,* that the unwritten law of England "includes not only general customs or the common law so called, but also the particular customs of certain parts of the kingdom, and likewise those particular laws, that are by custom observed only in certain courts and jurisdictions." And he proceeds: "The monuments and evidences of our legal customs are contained in the records of the several courts of justice, in books of reports and judicial decisions, and in the treatises of learned sages of the profession, preserved and handed down to us from times of the highest antiquity. These maxims and customs are of higher antiquity than memory or history can reach." And he cites Sir Mathew Hale's remark, "that the original of the common law, is as undiscoverable as the head of the Nile."† As to the evidence by which this law is to be shown and identified, he says,‡ "the only method of proving that this or that maxim is a rule of the common law is by showing that it hath always been the custom to observe it." But this doctrine, taken literally, would evidently be quite imprac-

* Commentaries, vol. i. p. 63, 67. † History of Common Law, 55.

‡ 1 Com. 67.

ticable ; and he accordingly proceeds to explain it and says, " A material question arises ; how are these customs and maxims to be known, and by whom is their validity to be determined ? The answer is, by the judges. They are the depositories of the law, the living oracles, who must decide all cases of doubt, and who are bound by their oath to decide according to the law of the land."

The result of this view of the common law is, that the decision by a competent tribunal is proof that the point decided has been a part of the common law, from an antiquity " higher than memory or history can reach." And this is the reason of another doctrine laid down by the same author,* namely : " It is an established rule to abide by former precedents, where the same points come again in litigation." Yet he adds, " this rule admits of an exception, where the former determination is most evidently contrary to reason, much more if it be clearly contrary to the divine law. But yet, the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision be manifestly absurd or unjust, it is declared, not that such a sentence was bad law, but that it was *not* law. That is, that it was not the established custom of the realm, as has been erroneously determined." He however adds, that nothing once established as law should be overruled, unless it be "flatly contradictory to reason."† But Mr. Christian, the learned and able commentator upon Blackstone, says,‡ that precedents, when once clearly established, must be followed, though they are

* 1 Com. vol. i. p. 69. † Commentaries, vol. i. p. 70.

‡ Blk. Com. vol. i. p. 70, note.

"flatly contradictory to reason," and gives an example which fully bears him out. For as jurisprudence rests upon precedent merely, the court cannot overrule one precedent established by competent authority, except upon the ground of another precedent of a still higher authority. Accordingly, a distinguished writer of our own country says,* "that a solemn decision upon a point of law becomes an authority, and the judges are bound to follow that decision, "*unless it can be shown that the law was misunderstood or misapplied.*" And that it may be sometimes misunderstood or misapplied, he illustrates by the fact, that about one thousand cases in the English and American books have been overruled, doubted, or limited in their application; and it is apprehended, that the number very much exceeds this estimate.†

Such are the foundations of the unwritten law, and such the principles of decision, from which it evidently appears, that in its nature and essential character it resists change. It is indeed one of its excellencies that it does so, for if facility of change were admitted, there would cease to be any law of this description, and discretion and caprice would be substituted in its place. This shows the importance and necessity of occasional legislative interference, since the affairs of the world are subject to change,—and, unless the laws can be modified accordingly, they become inconvenient and burthensome:—and this is, to say the least, not less true, in regard to crimes and punishments, than in regard to any other subjects of jurisprudence.

* Kent's Com. vol. i. p. 477.

† See also Report of the Commissioners on the practicability and expediency of codifying the common law, 1836.

So true is this, that even the common law, notwithstanding the rigid and permanent character with which it should seem to be invested, by its very constitution and fundamental principles, is yet acknowledged to have yielded, in some degree, to the imperious exigencies of society. Thus, Sir William Blackstone says,* "Traditional laws being accommodated to the exigencies of the times, suffer by degrees insensible variations in practice, so that though upon comparison, we plainly discern the alteration of the law from what it was five hundred years ago, yet it is impossible to define the precise period, in which that alteration accrued any more than we can discern the changes of the bed of a river, which varies its shores by continual decreases and alluvions."

This language is not literally consistent with that above quoted from the same distinguished author. But the expressions there used were undoubtedly too strong, for the history of jurisprudence shows, what no one indeed would think of doubting, that some customs and doctrines, which may have been very convenient, reasonable, and expedient five centuries ago, being adapted to the state of things at that time, have, in consequence of the changes that have taken place in the mean time, become, in reference to the present condition of society, "flatly contradictory to reason," and "manifestly absurd." In such cases, if a rule of law, the reasons and grounds of which have thus become obsolete, is so definitively and authoritatively settled by precedent, that the courts are absolutely bound by it, (as in the case mentioned by Mr. Christian, of the rule of the common law, that every legislative act becomes obligatory from

* Commentaries, vol. iv. p. 409.

the first day of the session, unless it expressly provides otherwise, and is thus in effect an *ex post facto* law,) then the only remedy is by legislative interference.

The commissioners would not be understood as speaking in disparagement of the common law, which is fraught with sound maxims and principles, and is in general, particularly characterized by its jealous vindication of personal liberty. But all systems of law and civil policy and social institutions, however excellent, have their untoward biases and tendencies,—and the common law is not exempt from these; and they ought to be understood, since an examination of the principles and characteristic operation of a system is the first step in making a fair exposition of the system itself, as well as in pointing out its errors and perfections.

The fundamental principles and binding authority of the common law are generally accepted as laid down by the authors above cited, and so they are understood by the commissioners to have been stated by the former commission, in 1836, in their report to the legislature on the subject of the practicability and expediency of codifying the common law. It ought to be mentioned, however, that a different view has been entertained by some on this subject. A respectable writer on the history of the common law* lays down the doctrine, that it consists of a collection of customs and maxims, which derive their binding power and the force of laws from long and immemorial usage, coupled with the express or tacit consent of the legislature." Others express the same doctrine in a different form, by saying that these customs and maxims derive their force, as laws,

* Crabb's Hist. Com. Law, p. 1.

solely from the express consent of the legislature, that is, from acts of parliament, the records of some of which remain on the statute book, while those of the others, dating from an early antiquity, have been lost. This theory has the recommendation, that it refers the common law to the proper source of law, namely, the legislative or law-making power. But it is open to the objection, that, as far as the supposed *tacit* consent of the legislature, or instead of it the unknown lost records of antiquity are concerned, it seems to be a mere fiction. In reference to some particular rules, there may be some evidence more or less satisfactory, that they did originate in the code of king Alfred or of Edward the confessor, or in some other legislative act, and have been transmitted to the present times, through express legislative enactments, of which the records are lost, or that they have been implicitly recognised by this or that act of parliament. But in respect to a great mass of the common law, having reference to matters, that were not known in such remote times, and have not been alluded to in the statutes, this theory is plainly a fictitious assumption. And though it is a maxim of the common law, that a fiction of law shall never work any wrong, yet it would be evidently dangerous, to make it the only basis of a law designating crimes and assigning punishments. Another objection to the same theory is, that it supposes the courts either to contravene or to repeal and enact statutes ; for, in the thousand decisions of the courts already overruled, doubted or modified, this theory supposes some six or seven hundred acts of the legislature, more or less, to be involved, and if all these decisions, while they remained unimpeached, were demonstrative evidence of the existence of so

many statutes, then the courts have by overruling them in effect repealed so many statutes, and enacted others in their stead, or if, according to the doctrine of Sir William Blackstone above quoted, the overruling decisions are proof that those overruled were "*not* law," and that the rules embodied in the overruling decisions were and always have been law, unless these shall be overruled in their turn, it follows, necessarily, that from the earliest antiquity down to the time of pronouncing the overruling decisions, the courts had been contravening the statute law. In this case, as in many others, a fiction in law is the prelude to a dilemma. The position, then, that the rules and maxims of the common law are a body of statutes, ought to be abandoned, and we must stop at the position of Sir William Blackstone, who states what is the prevailing doctrine on this subject. This doctrine is not that the legislature assents universally to the rules and precedents of the common law, and puts them on the footing of statutes, but that it invests the courts or consents to their being invested with authority, within certain limits and subject to certain restrictions, to determine the law. In case of a statute, the courts must necessarily determine its construction; so in respect to the unwritten law, they must determine on the existence of a custom; but this is not the same in effect, as if the legislature had itself used the very language adopted by the courts in announcing their determinations.

The inquiries, whence does the common law derive its authority, and what are its constituent parts, and its limits, though they have an intimate bearing upon our own jurisprudence, as well as that of England, yet do not bear to the same extent, and in exactly the same way,

in the two cases. The difference arises from the circumstance, that the constitution of this commonwealth, in the article already cited, gives an express sanction to, and explicitly adopts, the common law as a part of the law of this state. So that in regard to our own jurisprudence, we are at no loss to find whence the common law derives its authority. But when we come to the inquiry, in what respects, to what extent, and with what exceptions and modifications the common law of England has been adopted, we are necessarily led into an investigation of the foundations, principles, constituent parts, and limits of the common law of England, in order, when it has been ascertained of what it consists, to select that part of it which has been so adopted by our constitution.

In making such selection, the constitution gives no other designation of what has been so adopted, than the general description, "All the laws which have been adopted, used and approved in the province, colony, or state of Massachusetts Bay, and usually practised on in the courts of law, such parts only excepted as are repugnant to the rights and liberties contained in this constitution." As there are no regular reports of our jurisprudence further back than from a period of about twenty years after the adoption of the constitution, we have no direct contemporary evidence of the law so adopted, approved and usually practised upon in the courts, excepting the known practice of the courts in 1780, the records of the courts previous to this time, and some few written memoranda and oral traditions. Nor has it ever in our subsequent jurisprudence under the constitution been deemed necessary, when a question has arisen at common law, to go back and show, by some historical

evidence, that the rule in question had in fact been specifically adopted, approved or practised on in the courts, before the date of the constitution, the construction put upon the constitutional provision in question being as above stated, that the common law of England generally, as far as it was applicable to our constitution, and had not been superseded by the constitution and legislation of the commonwealth, was thus made a part of its laws. So that to ascertain this part of the unwritten law, it is necessary, first, to ascertain that of England; then to see how much of it that is applicable in this commonwealth has been superseded by the constitution and statutes.

An extensive mass of materials is thus presented for examination and analysis. Numerous digests, treatises, and volumes of reports, are occupied wholly with the jurisprudence in relation to crimes and punishments; all of which must be examined, though they are necessarily to a greater or less extent, repetitions of the same doctrines. And as far as they coincide and agree in the statement and construction of those doctrines, the mass of materials to be wrought up is thereby in effect diminished, but as far as they differ, the labor is increased in proportion to the number. It is necessary, also, to examine the decisions in this branch of jurisprudence, scattered through our own reports, and the English reports; and also through those of other states, where the points decided are applicable in our own jurisprudence. The commissioners also consider it to be their duty to consult the penal codes of greatest reputation; for though these are not direct authority for what is our common law, yet being the results of the experience of other civilized communities, and of the laborious study of learned

men, they afford essential assistance in analyzing our own law on the same subjects, and especially in suggesting amendments. A digest of the penal laws of other states or other countries, particularly of those of Scotland, may be useful in the same way.

As the constitution only adopts the common law in force in 1780, the query may be suggested, whether any English report or treatises subsequent to that period need to be examined. That they should be consulted, there can be no doubt, since they are evidence as we have seen of what the common law of England was, as well before as since that period. Indeed, according to the description of that law already quoted, the latest report of a decided case upon any point is the best evidence of what the law has been from the beginning. Whether this be so or not, such a report is undoubtedly often evidence of what the law has been for a long period. So an act of the British parliament, subsequent to 1780, declaratory of the common law, has been considered by our supreme court as evidence of more or less weight to show what was the common law.*

The part of the common law of England, thus adopted by the constitution, does not constitute the whole of the common law of this commonwealth, in the broad sense of that expression as comprehending all the unwritten law, or in other words all that is not the statute law. It has been said, that "the usage of the country establishes and makes the law of the country."† This proposition is unquestionably true in the qualified sense, in which it was no doubt intended. This will be evident

* Bull *v.* Loveland, 10 Pickering's Reports, p. 13.

† Commonwealth *v.* Deack and others, Mass. Reports, vol. i. p. 61.

in the example of one of our own statutes upon a subject entirely unknown to the English law. For to give it any effect it must be expounded ; some construction must be put upon its language ; and for this purpose, as far as the statute itself or some other one does not afford the means of interpretation, the common use of language must be resorted to, not merely to fix the meaning of particular words, but often to determine the sense of entire clauses and provisions. This is a species of unwritten law, which must exist in all communities, and no less in civil than in criminal jurisprudence. For instance, a statute passed in England about a century after the first emigration to this state, establishing the negotiability of promissory notes, was practically adopted into our jurisprudence, previously to the date of the constitution, and thus became a part of our unwritten law. The few statutory provisions in this commonwealth, in relation to this commercial contract, and the few words, in which the contract itself is usually expressed, constitute the written law as between the parties to it. And yet to find out all that such a contract imports, it is necessary to read through a large volume. So a penal statute fixes the relations and obligations existing between the parties to it, namely the community on one side, and each citizen of the state on the other, and to find out all the relations and obligations thus created, much must be learned which the statute itself, though it may suggest, does not, and ordinarily cannot, fully express.

Another extensive branch of unwritten law is included under the title of *practice*, that is, the rules and forms of proceedings and usages of the courts, which in all their details are never attempted to be laid down

in any code, though their outlines and general principles may be given by the written law.

The unwritten law, then, on the subject of crimes and punishments, presents a very extensive mass of materials, very widely dispersed, out of which the code is to be constructed ; nor is the task of constructing a symmetrical system, out of these materials, by any means free from difficulties. For the most part, the rules, which constitute this branch of law, must be traced back to and be extracted from adjudged cases. And, as has been remarked by Mr. Livingston, to enhance the difficulty of this process, the cases on the penal law have been reported much less satisfactorily than those arising in civil jurisprudence ; so that in many of them, it is not easy to learn what was the rule of decision. Sometimes the case being stated, several distinct grounds of the decision are given, but whether any one of those was considered a sufficient one, on which to rest the decision, or, two or more were considered to be requisite, does not appear by the report. Sometimes where the case has come before a court consisting of numerous judges, it is said that some of them were governed by one reason, others by another, in concurring in the decision, but how many were governed by this or that reason is not stated, and consequently, though the case was solemnly adjudicated upon and formally reported, it is not an authority to any rule whatever.

In other instances, a mass of facts is given, and the decision stated for or against the accused, but no reason, no doctrine, is precisely laid down; nor can it always be satisfactorily deduced from the facts stated, taken in connection with the judgment rendered, since the facts

are often defectively stated, and there are instances not a few, in which a report of a case, having been acquiesced in for some years as correct, has on resorting to the record been found to be erroneous. These were instances of errors which the record supplied the means of correcting, but every thing material to the decision does not always appear on the record, and an error or omission in regard to any matter which does not so appear can be corrected or supplied only by resorting to the minutes of the judge, before whom the case was tried, or to some other report of the case.

The history of this branch of jurisprudence supplies numerous instances of errors in the reports of cases which have been thus corrected. In regard to defects of either of these descriptions, in any report of an English case, which cannot be remedied by resort to some other published report, the commissioners cannot, at this distance from the place where the proceedings were had, ascertain either the true state of the facts, or the precise rule of the decision; and the labor, perplexity, and uncertainty of the search, though not enhanced by distance of place, are sufficient discouragements to undertaking it, excepting in those cases where the most important questions are involved in the investigation. The only safe course, at this distance, seems to be, to pass by, and reject the authority of cases, the reports of which are evidently defective, in some material particular, or of the accuracy of which there is reason to doubt.

Where the case is accurately reported, and the rule of decision distinctly appears, then the question arises, whether it is sufficient evidence of that rule being a part of the common law. For though the decision of the

courts are the most authentic evidence of the common law, it does not follow that all of them are equal evidence, and that every one of them is a demonstration of some point of the common law, whether given by a superior court, or a subordinate one, by one judge or many judges, by a unanimous voice, or a bare majority; and whether pronounced in haste on a first impression at the trial, or on solemn deliberation by the assembled judges. There is such a thing as the *weight* of evidence in matters of law, as well as in matters of fact, and as the testimony of some witnesses is very slight proof, while that of others is very strong proof, of the facts stated by them, so some decisions of courts are very inconsiderable evidence, while others are very cogent evidence of the law. And then the number of decisions to any point of law is to be considered, no less than that of the witnesses to any matter of fact. Thus, Mr. Christian says, and truly, that the number, and authority of the decisions concurring in the same doctrine, may be so great, as to establish as law what is flatly absurd and unjust.

But no one will attribute this efficacy to all precedents indiscriminately. In extracting the rules of the unwritten law from the great mass of decisions through which they are scattered, it is necessary to consider, in each case, the weight of the authorities by which they are supported, and even sometimes, whether they are supported by an authority entitled to any weight whatever. Particularly in case of discrepancies it is necessary to compare the weight of authorities on the two sides of a question. This comparison is to be made, not only between different cases, but sometimes in the same one, where the judges were divided, and where

the ruling of one judge is, on the case being reserved, overruled by a small majority of all the judges. And in making this analysis, though there are instances of doctrines so firmly established, that their binding authority cannot be called in question, however anomalous or unreasonable they may be, yet in very many precedents, at least, (what proportion of the whole it is not easy to say,) their mere naked authority, independently of their reasonableness, and their conformity to acknowledged general principles, is by no means conclusive, so as to preclude all examination or question.

Such are understood by the commissioners to be the extent, and the component parts, and such the depositories of the unwritten law, which the legislature propose to reduce to a systematic code, and such the process to be gone through, in order to extract the rules and propositions, of which such a code must consist.

The commissioners had hoped, that in one part of their labors, namely, that of settling what is the common law of England, they should have been able to avail themselves of the final report of a board of commissioners, appointed under an act of the British parliament, in 1833, for the purpose of collecting and arranging the doctrines of that law. It does not, however, appear, that they have as yet brought their labors to a conclusion.

A question of no little difficulty and importance, in preparing the proposed code, relates to the minuteness and particularity, to which it is expedient to carry the codification. For a code covering precisely the same extent of subjects, may be very short, or may be expanded into a great bulk. For instance, the written law may either provide, that whoever commits murder, shall

suffer death, or instead of this concise enactment, it may define what is meant by murder, and having given this description, may go still further, and explain and illustrate it. And yet in either case, the code will cover precisely the same extent of subjects.

It appears to the commissioners, that the codification of the criminal law should only stop at that limit, by going beyond which, the law cannot be made more plain, precise, and definite. For where the law requires the citizen to do or abstain from certain things, under a penalty, and invests officers with authority to use coercion and inflict pain, and stamp ignominy, it seems that it cannot be too explicit in laying down the rules to be observed. To determine whether the criminal laws of this commonwealth answer this description, and whether they admit of any improvement, it seems to be sufficient to refer to the sources to which it is necessary to resort in order to find them, and the laborious examination by which alone, they can with any probable certainty be ascertained, as already described in the former part of this report.

In proceeding to the performance of the duties of the commission, another material question arose, as to the *form* in which the code should be prepared, as distinguished from the matter or provisions of which it should consist, for these were prescribed, namely, those of the common law, but they might be framed into codes differing from each other very much in form, and yet embracing substantially the same laws. Upon this question, the commissioners were at the commencement of their labors in much doubt, and they found amongst themselves, very considerable diversity of opinion. It was evidently necessary to settle this question in the

outset, since they could not otherwise pursue the work in concert. After long and repeated discussions, it was finally proposed, that each one should attempt the execution of some title, in such form as he might think best. Repeated specimens of this description were successively produced and compared, from which it appeared, that they were gradually converging towards the same plan. In these discussions and tentative specimens, the commissioners had the benefit of the great learning and experience of the former chairman, until he announced to the board, that the state of his health rendered it necessary for him to vacate his place in the commission.

The form subsequently adopted will appear by the annexed specimen, which it is one of the principal objects of the present report to exhibit to the legislature, with the leading reasons for its adoption. The specimen will show that the commissioners do not understand it to have been the intention of the legislature, that they should prepare a digest of the common law like those of Hawkins, East, Russell, and Deacon, nor commentaries after the model of those of Sir William Blackstone, which the legislature, after having revised and corrected it, might approve by some collateral enactments, as being of paramount authority, and as far as it should go superseding the authority of the common law precedents; but that they were to report a set of rules and propositions, expressed in a language which might without impropriety be assumed by the legislature. Accordingly, all expressions of mere opinion, of supposition, of doubt, of probability, of inclination to one or the other side of a question, and formal statements of grounds and reasons of the propositions laid down were

to be avoided, and a direct assertion of what the legislature declared the law to be scrupulously adhered to in every part of the code; which would thus have the character of an act declaratory of the common law; this being the character which it was supposed the legislature intended to give to the work.

At first the commissioners entertained serious doubts, whether the mass of materials before them could possibly be wrought into this form, without too much straitening and embarrassing the practical application of the rules so constituting the unwritten law, and destroying its elastic and expansible character, and rendering it too rigid and unflexible. But, upon the whole, they are well satisfied, upon experiment in the reduction of different titles to this form of expression, that the work may be so executed, and yet not be liable to such objection. The particular phraseology used in any part of the code might of course render it liable to the defect in question; but this, it is apprehended, would be owing to an injudicious and unskilful manner of executing the plan in any particular part, and not to any necessary result of the plan itself. It is true, that the propositions thus laid down as law must thereafter be taken to be the law, until it shall be otherwise determined by the legislature. In this respect, it will be precisely like those parts of the existing common law, which, as has been shown, must remain to be the law of the land until it shall be otherwise declared by the legislature. This is only saying, that they would be *law*, for a rule that is subject to be changed, without notice, is not a law, but merely the ground of a greater or less degree of probability of what may be law. It does not appear, that in any other respect, the proposed plan of the work, will

necessarily render it liable to the objection above mentioned. This form of executing the work necessarily involves the not unfrequently clearing up, by legislative authority, the doubts, and ambiguities, and of settling the discrepances, and the conflicts of doctrine and authorities, presented in the books. It results in a revision of the common law by the legislature to the extent of the codification, and this is one object in view, as appears by their resolve.

In determining on the form of the code, a consideration already mentioned had much weight, namely, that in some parts the common law supplies both the text, the inferences, and the comments; in other parts, the existing statutes form the text, and the common law is the comment. As far as any offence, or any variety or subdivision of an offence now punishable, is omitted in the written law, so far the unwritten law must supply the whole materials of the code. Now, as it is not contemplated by the legislature to change the provisions of the existing statute law, these must remain, and as far as they go, constitute the law under each title, and to these must be adapted, in a systematic form, the doctrines of the common law, relating to the same subjects. The statutes of the criminal law are in the form of decrees, commands and prohibitions. This is the appropriate form, where crimes are forbidden, and punishments assigned, or the duty of magistrates and officers prescribed. Whereas, an act declaratory of the common law has a different form of enunciation. Now as the common law proposed for codification consists partly of what are in effect, and practical administration, commands and prohibitions, and the resolve under which the commission is constituted, proposes the preparation of a

"systematic code," and as such a code can be framed, only by adapting the common law to the existing statute law, in such manner, that they may, taken together, being in fact only different parts of the same thing, form the entire systematic body of the criminal law, there seemed to be but two methods, in which the work could be executed. One method would be to reduce the common law to the ordinary statutory phraseology, and thus expand the existing statute law, so as to make it commensurate with the common law. The other method would be, to mould those parts of the common law, which are homogeneous with the provisions of the existing statutes generally, into a similar form of phraseology, and enactment; and to cast the rest of the common law, consisting of deductions, expositions and illustrations, in the form of a general declaratory act. This does not involve the necessity of two distinct statutes, for the same statute may be declaratory in part, and in part mandatory, and prohibitory. The commissioners had no hesitation in adopting the latter of the two methods. They propose accordingly to fill the breaks and chasms of the present statutes, by introducing the appropriate parts of the common law in a similar form of phraseology. It is true, that those parts of the common law, which only fill up chasms in the provisions of the existing statutes, might be all thrown together into a distinct additional act, but this would render it necessary to repeat many of the provisions of the present statutes, and would extend the additional act to a cumbrous magnitude, and make it of a very miscellaneous and wholly unsystematic and confused character, and render the revision of the work by the legislature ex-

ceedingly perplexing, by reason of the separation of the different parts of each subject matter.

Even if it should be deemed expedient eventually to throw those parts of the common law into a distinct additional statute, the decidedly best mode of presenting them to the legislature would seem to be, to present them in combination with those parts of the existing statutes with which they are connected, that it may more obviously appear how the whole law will read, when thus reduced to a written form. The commissioners would not be understood as intimating any doubt of the expediency of permanently connecting together, as above explained, all the law on each subject, both the existing written law, and that which is proposed to be made such, and do not see how the work when completed can otherwise be considered a systematic code; for the common law as already suggested being when wholly collected and arranged only a part or fragment of the subject, (where the existing statutes have covered any part of a title, as they do of most titles,) cannot of itself constitute a system; it is only as connected with the existing written law, that it can be rendered systematic; and the work would lose its symmetrical character by severing its parts, and disjoining and distributing their fragments in different places.

In regard to amendments of the common law, the commissioners do not understand it to be contemplated by the legislature, that they shall studiously seek to make them, but to confine themselves in this respect to such amendments as seem to be essential to the consistency and symmetry of the system, and such as may be forced upon their attention, by the plainest reasons. It will be obvious, on the reading of any title, that the

work of codifying the common law, and forming it into a system, could not proceed to any useful purpose, without making amendments in those parts, which, when brought together, are found to present incongruities, and without the exercise of discretion in stating what is proposed to be considered the law on numerous doubtful points, instead of undertaking the all but hopeless task of nicely balancing conflicting authorities, and stating what it now is. Wherever an amendment is proposed, it will be mentioned in the notes, and the reasons given, unless they seem to be sufficiently obvious on the face of the amendment itself.

Though the commissioners understand it not to be their duty under their commission to propose changes in the provisions of the existing statute law, and the difficulties and labor and responsibility of preparing the work will, without such addition, be quite as great as they desire, still this will not prevent them from occasionally suggesting to the legislature a modification of the provisions of the existing statute law, when it seems to be recommended by urgent considerations, and especially when it appears to be essential to the harmony and symmetry of our laws and jurisprudence. A case of this description appears to them to occur in the title of homicide, in respect to the distinguishing of murder into degrees, according to the greater or less atrocity of the crime, as will appear in the specimen accompanying this report.

Upon this plan when completed, the entire body of the written criminal law will consist of two component parts, one comprising the mandatory, prohibitory, and penal provisions, and the leading and fundamental principles of the law; the other, of expositions, inferences and il-

lustrations. The law now consists of these parts, and every body of laws must be so composed, whether existing in the form of written or unwritten law, or of both those descriptions, and in whatever proportions. The difference in form, between the plan proposed and the other codes, that have come under the observation of the commissioners, is, that in those codes, these two component parts are put together, in a continued text, though they generally contain but little beyond the provisions of the class first above mentioned ; whereas, in the proposed work, the different portions of the expository, illustrative part will be appended to and accompany those provisions of the other part, to which they respectively relate, and thus be placed in the most intimate connexion with them, without, at the same time, interrupting the continuity of the main and leading and what may be called the integral part, consisting of the provisions of the existing statutes and such additions to them as the common law may supply, as already explained. This form was in a manner forced upon the commissioners, by the circumstance, that the provisions of the existing statutes were to be retained, and those of the common law must therefore be framed and adapted to them. But on the whole, upon experiment, they are inclined to the opinion, that it is the best form and the one they should choose were it left entirely to their discretion. It appears to them to be more simple, systematic, intelligible and convenient to read or consult, than the form usually followed.

For instance, one essential circumstance in the definition of robbery is the taking of a thing from another. If the written law goes farther and explains what is meant by a "*taking*" in this application of the term, it

seems to be quite as symmetrical, to append this explanation, by reference, as to insert it in a subsequent part of what may be called, for the present purpose, the text. Wherever it is placed, it does not purport to add to or subtract from the section to which it relates, and so is not properly preliminary to it, or a continuation of it. It is essentially collateral and subsidiary, and seems to be most appropriately so presented.

In order to facilitate the revision of the code, by the legislature, it is proposed to refer to the authorities, from which each part of it is drawn, or where the same subject is treated ; for where the law in its present state appears to be ambiguous or obscure, as it must be confessed is too often the case, though it may suggest provisions for the code, it can hardly be considered as an authority for such provisions. Where the commissioners doubt whether the authorities fully bear out the proposed written law, the attention of the legislature will be called to the circumstance, in the notes accompanying the code.

In another respect, also, they propose to depart from the usual practice in other codes, as will appear from the specimen, namely, in giving concise illustrations from adjudged cases. They at first doubted whether such illustrations would with propriety be assumed by the legislature, but upon experiment, their doubts upon this point have been entirely removed. It appears to them, that this method is attended with very material advantages. It renders the law more intelligible and clear than it could otherwise be made. It exhibits the construction, spirit, and scope of the law, illustrated in the most impressive manner. It adduces directly the essential authoritative evidence of the unwritten law.

It serves to guard the commissioners from mistakes in framing the code, and affords great facility to the legislature in detecting mistakes, when such may occur.

In regard to the language to be adopted, it is not, as the commissioners apprehend, expedient to attempt to discard all technical terms, since many of these have a well-defined meaning in legal phraseology, which cannot be conveniently expressed in each particular case, by the substitution of definitions. The occasional use of such terms will make the phraseology more concise, and since they are to be explained in a glossary, forming a part of the code, their meaning can be readily ascertained.

The commissioners respectfully submit their preliminary report, with the accompanying specimen, to the legislature.

WILLARD PHILLIPS,
JOHN GRAY ROGERS,
LUTHER S. CUSHING,
SAMUEL B. WALCOTT,
JAMES C. ALVORD.

Boston, *February* 1, 1839.

SPECIMEN.

PRELIMINARY NOTE.

The specimen, which is in accordance with the general plan of the commissioners, as developed in their report, consists of a portion of their executed work upon the law of murder. It is presented in three parts, viz. (1st) the statute, (2d) the exposition, and (3d) notes. The amended statute, which is recommended to the consideration of the legislature, is in three sections, containing the definition and provisions for the punishment of murder. This embraces, generally, the whole law upon the subject; as, if it should be adopted, no one could be convicted of murder, unless on account of a crime, coming within the definition in the first section; or be punished in any other manner than is provided in the second and third sections.

The "*exposition*" is not intended to have nor can it have the effect to make any different or additional law: but only to explain and illustrate the rules contained in the statute, by various cases, and principles of construction and application, which are scattered through the books of jurisprudence. Nor does the exposition pretend to exhibit *all* the instances under the law, which may exist, or which may possibly arise hereafter, but such only as have been adjudged, and such as are necessary to render plain and definite the practical application, to show the scope and limits of the rule, and to settle questions of construction, which are often of great difficulty, not only on account of their inherent character, but the present form of the common law, and the various and conflicting opinions, which have been entertained and pronounced upon them.

The "*notes*" will form properly no part of the code, when adopted, but are reported with the text, to aid in examining the sources, and, in some measure, the reasons of the opinions of the commissioners, and to afford facilities for correcting any error, into which they may have been led by an inconsiderate or mistaken judgment.

AMENDMENTS.

The commissioners have recommended few substantial amendments to the law in this part of their work. They propose none indeed, which may not properly be considered as merely formal, excepting that very important one, which they recommend in the establishment of degrees in murder, in order to regulate the punishment, according

to its greater or less atrocity. They had some hesitation in deciding to propose this amendment, not from any doubt as to its inherent propriety; but lest, in doing so, they might overstep the limits, which after much consideration and in view of the resolve under which the commission was constituted, they have assigned to themselves, and for which they have given their reasons in their report. They suppose that the recommendation of any fundamental change in the policy of the state would be without these limits. Many ardent friends of reform, and among them men of great excellence of character, have attacked the whole system of capital punishments, as wrong in principle and injurious in practice. The commissioners do not however consider the decision or the discussion of that question as within the powers delegated to them; and have not therefore even compared their own views upon the subject. That there shall be the punishment of death, applicable however to the very highest grade of offences only, they consider as, for the present at least, the settled policy of this commonwealth, a policy, which, if they had the disposition, they have not the power to disturb. It is a question too, it may be added, more perhaps *of fact*, depending upon the practical operation and effect of the system, than of principle, derived from the inherent rights of man, or the abstract powers of human government; and such questions, it belongs peculiarly to the immediate representatives of the people to originate and decide.

But the adaptation of established punishments to various offences, is a question of a different nature, depending upon widely different considerations. Upon nothing perhaps does the symmetry, as well as the general perfection of a penal code, more essentially depend than upon preserving, on known principles, a due proportion between crimes and punishments; and any code, which should neglect this obvious consideration and fail to preserve the relation of one to the other, and of both to the whole, if it should be a "systematic code," would be so only by reason of an artificial connexion, and not from any natural harmony of its parts.

If the punishment of death can be rightfully applied to any offence, it surely should be to that of wilful, deliberate, premeditated murder, for this is the most fearful, as well as the most atrocious, of all individual crimes. But, by the gradually extended meaning which has been given by the common law to the word "*malice*" as one of the ingredients of murder, it has been made to include many cases of unintentional killing, and a great variety of offences terminating accidentally in death, which have hardly a shade of the dark and deep malignity of the original crime, and which cannot, without great injustice and an entire disregard of the principles governing the wise adaptation of laws, be classed with it, as of the same grade, and deserving of the same punishment.

It is, for instance, a well established principle of the common law, that if one engaged in the perpetration of any "*felony*," [a word of wide and somewhat doubtful interpretation,] shall kill another, though accidentally, and where the offender could not have foreseen the consequence, he is guilty of murder. "As if," says Lord Coke, (3d Inst.,

56,) " A, meaning to steal a deer in the park of B, by the glance of the arrow killeth a boy that is hidden in a bush, this is murder, although A. had no intent to hurt the boy, nor knew of him." Or, to take a case more applicable here, from other authors, (1 East, 255 and 231; Foster, 258; 1 Hawkins, ch. 29, § 11.) " Where A. shoots at the poultry of B., and by accident kills a man; if his intent were to steal the poultry, which must be collected from the circumstances, it will be murder by reason of the felonious intent." This principle, which is in force with us, confounds very different degrees of crimes, both as to the depravity which they indicate, and the terror which they are calculated to spread through society. In the case just quoted, A. has not the guilt of murder or any similar guilt in his heart, and is not before God or man, in its true and original sense, a murderer. He was, to be sure, voluntarily engaged in the perpetration of a mean and detestable crime, but a crime vastly less than murder; and it is accident only, which has connected with it in any degree, the responsibility for the blood of a fellow creature. Undoubtedly, regard is to be had in the punishment to the *consequences* of crimes as well as the *motives*, which prompt to them; but this is only true, in its full extent, when the consequences might be foreseen and guarded against, and so enter in some measure into the guilt of the original design; and the principle cannot be justly extended, so far as it has been, to mere collateral consequences.

The commissioners would not indeed go to the length, which the " British commissioners for forming a penal code for India," have, in recommending, that " when a person engaged in the commission of an offence, causes death by pure accident, he shall suffer only the punishment of the offence, without any addition on account of such accidental death," but they would mark broadly the distinction between such a killing, occurring incidentally in the commission of an inferior crime, and that by the deliberate assassin.

They extract from the report of the India commissioners, the brief defence of their opinions. " To punish as a murderer every man, who, while committing a heinous offence, causes death by pure misadventure, is a course, which evidently adds nothing to the security of human life. No man can so conduct himself as to make it absolutely certain, that he shall not be so unfortunate as to cause the death of a fellow creature. The utmost that he can do, is to abstain from every thing, which is at all likely to cause death. No fear of punishment can make him do more than this, and therefore to punish a man who has done this can add nothing to the security of human life. The only good effect, which such punishment can produce, will be to deter people from committing any of those offences, which turn into murders what are in themselves mere accidents. It is in fact an addition to the punishment of those offences, and it is an addition made in the very worst way. For example, hundreds of persons in some great cities are in the habit of picking pockets. They know that they are guilty of a great offence. But it has never occurred to any one of them, nor would it occur to any rational man, that they are guilty of an offence which endangers life. Unhappily one of those hundred attempts to take the purse of a gentleman, who has a loaded pistol in his pocket; the thief touches the trigger by accident; the pistol goes off; the gen-

tleman is shot dead. To treat the case of this pickpocket differently from that of the numerous pickpockets, who steal under exactly the same circumstances, with exactly the same intentions, with no less risk of causing death, with no greater care to avoid causing death, to send them to the work-house as thieves, and him to the gallows as a murderer,—appears to us an unreasonable course. If the punishment for stealing from the person be too light, let it be increased, and let the increase fall alike on all the offenders. Surely the worst mode of increasing the punishment of an offence is to provide, that, besides the ordinary punishment, every offender shall run an exceedingly small risk of being hanged. The more nearly the amount of punishment can be reduced to certainty, the better. But if chance is to be admitted, there are better ways of admitting it. It would be a less capricious, and therefore a more salutary course, to provide that every fiftieth or every hundredth thief selected by lot should be hanged, than to provide that every thief should be hanged, who, while engaged in stealing, should meet with an unforeseen accident, such as might have befallen the most virtuous man, while performing the most virtuous action."—(Report, Note M., pp. 64–5.)

See also the remarks of Haus upon the provision of the revised code of Belgium, making murder more or less aggravated, as it should or should not be connected with the commission of another crime. (Haus's observations &c. p. 202.) Also the remarks of Mr. Livingston on this subject in the preliminary notes to his code (pp. 182–187.)

It is very obvious, that this indiscriminate application of the punishment of death to all cases of either actual or implied malice, is much more out of place in our system than that of England,—for their code, in its theory at least, is more sanguinary than our own. There, according to the theory of the common law, every felony involved a forfeiture of the lands and goods of him, who committed it, and was almost uniformly punishable with death, with or without the benefit of clergy. Every crime indeed, which was made a "*felony*" by statute, and for which there was no special provision, drew after it, as of course, this punishment. Where then the malicious purpose to commit one felony was transferred by the law to another, which resulted, though incidentally, in the execution of such purpose, little violence was done to their system. But here, where a felony has no such necessary consequences,—where its commission involves no forfeiture, and is in a few instances only punished with death, the disregard of the degree, in the malignity of the actual purpose, is at war with our general principles of punishment. The common law of England, in this respect, is adapted to a system wholly unlike our own, and is not "suitable to our circumstances, and the general spirit of our institutions."

It is another familiar principle of the common law, that every killing shall be presumed to be with malice and therefore murder, unless the contrary appear; and although manslaughter is defined to be "the killing of another unlawfully and in the fury of one's mind," yet it has been often decided that passion is not sufficient to reduce the killing to this grade of crime, if the provocation, which excited it, were by words only and not by any actual bodily violence. The law has here its indulgencies for pain of the body, but none for pain of the mind.

And yet who does not know, that the provocation may be as great, as adequate to induce, at the moment, a dangerous blow, in the one case as the other? Upon some temperaments, indeed, and those sometimes possessed by men not of the most debased nature, the effect might be even stronger and more irritating in the first case than in the last; and yet the law allows no mitigation, no apology for a human infirmity, which is wrought upon by derision or insult of word or gesture, however provoking; and thus, where there is only the *moral* guilt of manslaughter, the offender pays the penalty of *legal* murder with his life.

Such cases are not unfrequent. In a case before the Supreme Judicial Court, Hampden, Sept. T. 1837, the defendant was tried on an indictment for the murder of Jones. It appeared that he was sitting by the fire in company with several others, when the deceased entered the room, and addressed him in language of the most cruelly insulting and irritating character, which he withstood for a while with a remonstrance: when, upon its being repeated in a new and still more aggravated form, in a phrensy of passion produced by it, he seized the tongs which were by his side, and struck the deceased a blow, which caused his death. Here there was clearly no intention to kill and no settled malignant purpose whatever. The offence was committed in the sudden heat of passion,—"the fury of the mind,"—produced by a provocation, as adequate to excite it as any bodily injury; and fell far short of the deep guiltiness of the deliberate assassin. An undoubted case of murder, as it was, under our laws, one jury would not agree to a verdict of conviction, but the second rendered a verdict of guilty, and sentence of death was pronounced upon the prisoner: but jury, and court, and prosecuting officer, joined in recommending him to the mercy of the executive, and his punishment was commuted. But the laws themselves ought to make these natural distinctions, and not leave the criminal code, so that it shall require the executive prerogative, given for widely different purposes, to soften and harmonize its features.

A criminal code, which sends such a man to the gallows, while it only condemns to imprisonment him, who knowingly swears away his neighbor's life, and has the double guilt of wilful perjury and deliberate murder upon his soul, cannot commend itself to that universal love of justice, which is the best support of law.

The commissioners propose, that there be established two degrees of murder: the one, punishable with death, including all cases of wilful and premeditated killing, (indicated in our law by the words "*express* malice aforethought,") and those cases also where the killing occurs in the perpetration of a crime, itself punishable capitally, and where therefore the intent may properly be transferred to the act;—the other, punishable with imprisonment for life or a term of years, including all other cases of murder, where the malice is "*implied*," contrary to the fact, from the general or particular presumptions of law.

This proposition has not certainly any merit for its originality, as such degrees, with nearly the same limits, are now established in several of the United States, as well as more or less extensively in nearly every foreign country on the globe.

The statute of New Hampshire, (act January 13, 1837,) provides that "All murder hereafter committed by poison, starving, torture or

other premeditated and deliberate killing, (these terms are equivalent to killing with '*express malice*') or which shall be committed in the perpetration or attempt to perpetrate rape, robbery or burglary, may be murder of the first degree; and all other murder shall be murder of the second degree," and provides the punishment of death for the first, and imprisonment for the last.

The laws of several other states are upon this point similar to those of New Hampshire, as in Pennsylvania, (Act March 9th, 1814,) Maryland (Act 1809, ch. 138, § 3,) Virginia, (Act March 6, 1819, 1 Rev. Code 616–17,) Ohio, (Act Feb. 26, 1824, 22 vol. of Laws 158,) and Missouri (Rev. Stat. of 1835, pp. 167–8.)

It ought also in fairness to be stated that such was the law of Rhode Island from 1798 to 1814, when the doctrine of the common law was restored by legislation.

The provisions in the laws of these different states are somewhat variant, though in all founded upon the same general principle. In Ohio, for instance, the first degree is similar to that in New Hampshire: the second, punishable by imprisonment for life, is "where any one purposely, but without deliberate and premeditated malice, kills another," while all other cases of killing, with "implied malice," are reduced to the grade of manslaughter.

In other states, of which New York is an eminent instance, much has been done by alterations in the statute law, giving a more limited effect to the definition of murder or reducing to the class of misdemeanors what were felonies at the common law, (so as to exclude the idea of malice in the case of killing accidentally in the commission of simple larceny, for instance,) to restrain within reasonable limits this wide extended implication of malice, and to punish as manslaughter only, what the common law denominates and punishes as murder.

(2 Rev. Stat. of N. Y. ch. 56, § 4, § 5 § 9, and amendment 3 R. S. app. 158, § 58.)

See also remarks of chancellor Walworth, as to the object of these provisions; Enoch's C. 13 Wendell, 175.

The commissioners have examined with great care the codes and treatises upon the criminal law of foreign countries; and believe that they can state confidently, that in no civilized community, (excepting such as derive their institutions of punishment from the common law of England,) even where their codes are the most sanguinary, is there provided the punishment of death for any other killing, than that which is wilful and premeditated. Most of these indeed have many degrees of culpable homicide, less than murder, according to the circumstances, as has also Mr. Livingston in his code; a course, which indeed justice and policy would alike require here, were it not for the wide discretion as to the duration of the punishment of imprisonment, which the general course of our legislation has entrusted to our courts, and which the commissioners have, in accordance with general usage, made use of here; leaving the extent of the punishment in cases of killing with implied malice in each case to be determined by the courts according to its circumstances.

With this brief exposition of the reasons of their opinion, the commissioners commend the subject anew to the careful examination and considerate decision of the legislature.

HOMICIDE.

I. MURDER.

SECTION I. Whoever shall unlawfully kill any human being, with malice aforethought either express or implied, shall be deemed guilty of murder. (*a*)

SECTION II. Whoever shall commit murder, with express malice aforethought, or in the perpetration or attempt to perpetrate any other crime punishable with death, shall be deemed guilty of murder in the first degree, and shall be punished with death. (*b*)

SECTION III. Whoever shall commit murder otherwise than as set forth in the last preceding section, shall be deemed guilty of murder in the second degree, and shall be punished by confinement in the state prison for life, or for any number of years. (*b*)

NOTES.

(*a*) The commissioners propose, in the first section, to place the general *definition* of murder in the common statutory form, for the reasons stated in their general report. They refer, for the varying definitions of murder, at different periods of the common law, to Wilkins's Laws of the Anglo-Saxons, 480; Glanv. L 14, ch. 31; Horne's Mirror, 46; Dalt. ch. 95; St. 14, E. 3, ch. 4; Bracton L. 3, ch. 4, § 1; Britt. ch. 6, § 1; Fleta L 1, ch. 30; Kelham's Norman Dict., "Murder"; Cowell's Dict., "Murder"; Blount's Law Dict., "Murder"; Cowell's L. Dict., "Murder"; 3 Inst. 47; Staund. B. 1, ch. 10; 1 Hale, 424-5; 1 Hawk. ch. 31, § 3; Vin. Abr. "Murder," A. 1; 2 McNally, 553; Foster, 256; 4 Blk. Com. 198; 1 East, ch. 5, § 2; Bac. Abr. "Murder," A.; Jacob's Law Dict., "Murder"; 2 Ld.

Raym. 1487; Kelynge, 121–127; 3d Chitty, 723; 3 Starkie, 513; 1 Russell, (ed. 1831,) 421; Archbold, 818; 2 Deacon, 896; Roscoe, 562; Davis, J. 309; Davis, Cr. L. 92; C. J. Parsons's def. (Selfridge's Tr. 3); Brockenborough, J. in 6 Randolph's Va. R. 723; 6 Mass. R. 139; 7 Dane, Abr. ch. 212; Halsted's R. 242; Platt, J., 1 Wheeler's C. C. 274; Prince's Digest of Laws of Geo. 346, (1st ed.) 622, (2d ed.); Rev. L. of Indiana, (1831,) 180; Rev. L. of Illinois, (1833,) 133.

It will be seen, that, for many centuries, "murder" has been used to signify the highest grade of culpable homicide, and the general definitions of different authors are substantially the same.

The definition of lord Coke, (3 Inst. 47,) as modified by Mr. Justice Blackstone, (4 Com. 198,) is the most celebrated for its fulness and accuracy, and has been copied by nearly all the subsequent writers upon the subject, and adopted, with slight changes, by the courts, and into the statutes of several of the United States. It is: "Murder is where a person, of sound memory and discretion, unlawfully killeth any reasonable creature in being under the king's peace, with malice aforethought, expressed or implied."

The words, "*of sound memory and discretion*," are omitted in our definition, because the rules governing exemption from punishment for want of capacity, are *general*, applying as well and in the same manner to other offences as this, and therefore belonging to another part of the code.

We omit also the words "*in the king's peace*," or "*in the peace of the state*," (as in the definition of Davis, and in the statutes of Georgia, Indiana, and Illinois,) because they are not only unnecessary, but calculated to mislead. For it may be murder to kill a person at the time engaged in the perpetration of a crime, or even an alien enemy, "unless it be in the actual heat and exercise of war;" (1 Hale, 433; Archbold, 320;) in which case, the idea of murder is excluded by other parts of the definition, for then the killing would not be "*unlawful*," or "with *malice*." These words are unnecessary in an indictment. (3 Chitty, 75; 1 East, 345.)

We have substituted "*any human being*," for "*any reasonable creature in being*," because the former expression is more simple, and less liable to misapprehension; for, in a popular sense, an idiot is not a reasonable creature, and yet he may as well be the subject of murder as any other human being.

The word "*malice*" is here used in a peculiar sense, differing from its more obvious and popular meaning, yet it has been so wrought into the law of murder, and has obtained, in this application, so precise and peculiar a signification, that the substitution of any other word would lead to much doubtful interpretation. With the use of any substitute, indeed, we could not be sure that we had accurately stated the law.

As will be seen more fully hereafter, "*express malice*" means generally, malice proved to have existed *in fact*—"*implied malice*," such as the law *presumes*, often contrary to the fact.

(*b*) The second and third sections are proposed as a substitute for § 1, ch. 125, of Part 4 of Rev. Stat., which is as follows, (pp. 716): "*Every person, who shall commit the crime of murder, shall suffer the punishment of death for the same.*"

The reasons for this proposition are fully stated in the preliminary note. The slight change in the *procedure*, which it will occasion, is provided for in another part of the code.

EXPOSITION.

In order to constitute the crime of murder, as above defined:

1st. There must be *a killing;*
2d. The killing must be of *a human being;*
3d. It must be *unlawful;*
4th. It must be *with malice.*

And all these elements must be combined in every case of this offence. For, if there be not the first, or only the first, it is no *homicide;* if there be the first and second only, without the others, it is "*justifiable* or *excusable* homicide;"(*a*) if there be the first, second and third, without the fourth, it is "*manslaughter*"(*b*) only; but where all concur, it is *murder.*

(*a*) In England, there has been a material distinction between "*justifiable homicide*" and "*excusable homicide;*" and many cases of the killing of a human being by misadventure, or in self-defence, were of the latter class. The term "*excusable homicide*" imported some fault, but of a nature so trifling that the law did not stamp it with the guilt of felony. In theory, it was punished with a forfeiture of goods, but in early times the jury finding the fact specially, a general pardon was always granted, under the statute of Gloucester, (6 Ed. 1. ch. 9,) which saved the forfeiture. Afterwards, the judges permitted a general verdict of "not guilty" to be rendered, though for some time, it would seem, without any authority of law. The statute 9 Geo 4, ch. 31, § 10, put an end to the theory, and sanctioned the practice of acquittal, by enacting, that "no punishment or forfeiture shall be incurred by any person, who shall kill another by misfortune or in his own defence, or in any other manner, without felony;" but the old terms, though they import no legal distinction, are still preserved in the English books for convenience. With us, where the doctrine of forfeiture never took root, and is prohibited by the constitution, there was never any punishment for excusable homicide, nor other difference as to the legal *effect* between that and justifiable homicide; but if a case belonged to either class, the defendant was entitled to a general acquittal. See upon this subject, 3d Inst. 148; 4 Blk. Com. 188; 1 Hawk. ch. 28, § 1 & 22; ch. 29, § 30 *et seq.;* 1 East, ch. 6, § 8 & 36; Foster, 282–8; 1 Russell, 538–552; Roscoe, 464; Parker, J., Selfridge's Trial, 159. We use both terms in the course of the chapter, because the one is sometimes more appropriate than the other, regard being had to the natural and customary import of the words, and not to mark any discrimination as to legal consequences.

(*b*) For the law of manslaughter, see the next chapter.

1. THERE MUST BE A KILLING.

Killing is causing the extinction of life by means of some bodily injury.(c)

A killing may be by direct violence, as by striking,(d) stabbing,(e) shooting,(f) drowning,(g) strangling;(h) or it may be the indirect consequence of an act done, as in killing—by poisoning,(i) starving,(j) corrupting the air,(k) communicating infection,(l) laying a trap or pit fall,(m) letting loose a dangerous animal,(n) or generally by any other act, the consequence of which may be, and eventually is, death.(o)

(c) Liv. 4; Starkie's Ev. 513, (n. r.); 1 Hale, 429, and notes *infra*.

(d) Thompson's C., 1 R. and M., 139; Kelley's C., ibid. 113; White's C., 6 Binney's R. 181.

(e) Thurston's C., 1 Lev. 91; 1 Keble, 454–5, Edwards' C. 6 C. and P. 401; Goodwin's C.

(f) Hughes's C., 5 C and P. 126; Towle's C., 3 Price, 145; Selfridge's C.

(g) Dyson's C., R. & R. 523; Green's C., 2 St. Tr. 214; (Harg. Ed.)

(h) Tyson's C., R & R., 345; Huggin's C., 3 C. & P. 414; Caulkin's C., 5 C. & P. 121.

(i) Saunder's C., Plowd, 474; Gove's C, 9 Rep., 81; Anon. Kely. 52; Vaux's C, 4 Rep, 44 a. The killing by poison has been esteemed more criminal than any other species of murder. The stat. 28, Henry, 8, ch. 9, declared it to be high treason, and its punishment boiling to death; and under that statute, several persons in fact suffered this punishment. But the act was repealed by 1 Edw. 6 ch. 12.

(j) Beal's C., 1 Leon, 327; Squire's C, 1 Russell, 426.

(k) 1 Hale, 431–2; Paris & Fonblanque, (Med. Juris. 111,) question whether death can be produced in this way. However this may be as to the external atmosphere, it is undoubtedly true, that death may be caused by noxious gases, under many circumstances.

(l) Castile's C. Stra. 856; Huggin's C. Stra. 882; Bantridge's C. 9 Har. St. Tr. 146 (folio,) 17, 452 (quarto;) Paris & F. Med. Jur. 115.

(m) 4 Bl'k. Com. 35; 1 Russell, 617.

(n) Palmer, 545; 4 Bl'k. 197; 1 Russell, 622; Roscoe, 571; 1 Hale, 430.

(o) 3 Inst. 48; 4 Bl'k. Com. 196; 1 Hawk. ch. 31, § 4; 1 Hale, 428.—Foster, 322; 1 Russell, 425; Archbold, 319; Roscoe, 570; 2 Deacon, 900; Davis, C. L. 93; Holloway's C, W. I. 198; Greg's C., Kely. 64–134; Honneyman's C, Addison's R, 148; Martin's C. 3 C. & P. 211.]

So compelling a person to do an act, which is likely to produce, and does produce death, is a killing; (*p*) and this though the compulsion be by threats only, (*q*) or the command of one having authority. (*r*)

(*p*) 1 Russell, 425—6; Archbold, 319; Roscoe, 571.

(*q*) Evans' C., O. B. Sept. 1812, *MS.* Bayley, J. in 1 Russell, 425.

(*r*) Freeman's C., 4 Mason's R. 505. Here the deft., the master of a ship, compelled a seaman in a state of great exhaustion and debility, known to the master, to go aloft, and the seaman fell from the mast and was drowned. The master was convicted of manslaughter.

So where a parent, guardian, master, or other person, having the custody of a child, apprentice or servant of tender years, or of a sick man, insane man, or idiot, exposes him to a situation of manifest danger to life, or is guilty of gross neglect or cruelty towards him, and death ensue in consequence, it is a killing. (*s*)

As where a parent places a helpless infant in a hog-stye, where it is devoured;—(*t*) or on a rock at sea, where it is washed away; (*u*) or leaves it in a remote field, where it is destroyed by wild beasts or birds of prey, or trodden upon by cattle; (*v*) or exposes it, where it may perish with cold or famine, or want of care; (*x*) or a parent, master, or guardian refuses to furnish a child or apprentice of tender years or infirm health, to whom he owes support, with sufficient or proper sustenance, or lodgings or clothing;—(*y*) or town officers, to avoid a charge, shift a child from town to town, without sufficient food, or clothing, or other care;—(*z*) or one carries his sick father, against his will, abroad in an inclement season, (*&*);—in each case, if the duty violated be plain, and the danger apparent, and death ensue in consequence of the act or neglect, it is a killing.

(*s*) 1 Hale, 431, *et seq.*; 1 East, ch. 5; 3 Inst. 53; Kely. 56; 1 Russell, 426; Archbold, 319; 1 Hume, 279, and other authorities, *infra.*

(*t*) 1 East, ch. 5, § 13.

(*u*) Helen Wilson's C. 1 Hume, 278.

(*v*) 1 Hale, 431; 1 Hawk, ch. 31, § 5.

(*x*) Beal's C. 1 Leon. 327; Margaret Smith's C. 1 Hume, 279.

(*y*) Squire's C. 1 Russell, 426, note (n); Self's C. 1 Leach, 127; Gould's C. Salk. 381; Ridley's C. 2 Camp. 250; Elizabeth King's C. 1 Hume, 279.

(z) Palmer, 545; Holloway's C. 1 Russell, 425.

(&) 1 Hawk, ch. 31, § 5; 1 Hale, 431–2.

So where a jailer confines a prisoner in the same cell with an outrageous madman unbound; or with a person, dying of a malignant or contagious disease; or thrusts him into a loathsome and pestilential dungeon, knowing the danger, and death follows in consequence, it is a killing by the jailer.(a)

(a) The words in the text are taken almost literally from the work of an eminent writer upon the Scotch criminal law, to which we have been much indebted, especially for illustrations, (1 Hume, 281,) but the doctrine is undoubtedly that of the English common law. Britt. C. 11 § 9; Staunf. 36; 3 Inst. 52; Palmer 548; 1 Hale, 466; 1 Hawk. ch. 31 § 10, note; Foster, 322; Huggins's C. 2d. L'd. R. 1574; 2 Stra. 882; Caster *v.* Bambridge, 2 Stra. 856; 1 East, ch 5, § 92; 1 Russell, 459; Bac. Abr. Murder A. See the cases of Huggins, Bambridge and Acton, as reported at length in the State Trials, (Hargrave,) 17 vol. (quarto,) 310–452, *et seq.* (folio,) 9 vol. 107, 146, 182, *et seq.*

It is not a killing, in any case, to give false testimony against the defendant in a capital trial, though he be, on this testimony, convicted and executed;(b) nor to occasion death by the operation of words or signs upon the imagination or passions.(c)

But if words or signs are used, inducing to an act, which causes death; as if a blind man be directed to a precipice, or a deadly drug be recommended, and death ensue in consequence, it is a killing.(d)

(b) The early writers laid down the law to be, that it was a killing to take away the life of another, by swearing deliberately falsely in a capital trial. Mirror, ch. 1, § 9; Britt. ch. 52; Bract. B. 3 ch. 4, and see 1 Hawk. ch. 31, § 10. But lord Coke says, (3 Inst. 48.) "It is not holden for murder at this day," and such seems now to be the weight of authority. The only case we find is that of McDaniel and others, reported in Foster, 132, and 1 Leach, 44. The defendants were convicted, but judgment was respited, in order that the question of law might be fully considered. But the attorney general declined to prosecute the case further, and the prisoners were discharged from the indictment. The opinion of Sir Michael Foster was against the indictment. Sir William Blackstone, however, says, (4 Com. 196,) that the attorney general did not press the point on account of prudential reasons, and not from any apprehension that it was not maintainable, and in East's P. C. 50, it is added, that lord Mansfield had said, that the opinions of several judges, including himself, were strongly in favor of the indictment. Most of the more recent writers, however, seem to incline against holding it to be a killing. (4 Blk. Com. 196–7,) Chitty's note, 1 Russell, 427; 3 Chitty, 726; Archbold,

319; Roscoe, 573; 10 Am. Jurist. 261; and see Staundf. 36. By our Revised Statutes, (p. 732) a particular punishment is provided for perjury in a capital trial. The Gothic laws punished this offence with death, 4 Blk. Com. 196, quotes Steirnh. de jure Goth. L. 3, ch. 3. See also, D. 48, 8, 1; and Pothier's Pandects, 48, 8, No. 3, by which it would seem that in the Roman law, the judge also, if he were bribed, and under the influence of the bribe, improperly condemned a man who suffered death in consequence, was guilty of murder.

(c) This seems to be the well established doctrine of the common law. The distinction between destroying life by mechanical means or bodily injury, and by operating upon the fears or passions, appears not to be derived from any difference in the criminal nature of the acts, for the latter in many cases may show the deeper design and darker malignity, but from the difficulty in the latter, of the proof connecting the act with the result, and the dangerous latitude of the opposite principle. 1 Hale, 429; 1 East, 225; 3 Chitty, 726; 1 Russell, 425; 4 Starkie's Ev. 514; Roscoe, 570. See P. & F. Med. Juris. 110, note (a.) Mr. Livingston recommends the same provision in his project of a code, (p. 437;) and Mr. Hume, (1 Hume, 267,) states it to be the law of Scotland, and quotes the case of Wm. Duff, of Braco, and others, who terrified a woman in childbirth, so that she died, but were yet acquitted of homicide. The British commissioners propose the opposite principle for the code of India, (ch. 18, § 294, illustration (*b*)), and in a note, (App. pp. 67. 8,) defend their opinion, and attack the doctrine of Mr. Livingston, without mentioning that it is also that of the common law, in an able and elaborate argument. We give a short extract. "There will be, indeed, few homicides of this sort. It appears to us that a conviction or even a trial in such a case, would be an event of extremely rare occurrence. There would not probably be one such trial in a century. It would be most difficult to prove, to any court, that death had really been the effect of excitement produced by words. It would be still more difficult to prove, that the person, who spoke the words, anticipated from them an effect, which, except under very peculiar circumstances and upon very peculiar constitutions, words would not produce. Still, it seems to us that these points might be made out by overwhelming evidence; and, supposing them to be made out, we are unable to perceive any distinction between the case of him, who voluntarily causes death in this manner, and the case of him, who voluntarily causes death by means of a pistol, or a sword;" and they put many supposed cases in illustration.

(*d*) Davis's Cr. Law, 94; Liv. 437; and see Evans's C. and Freeman's C. above cited. The illustrations here are borrowed from Mr. Livingston.

So where one counsels or assists another to commit suicide, and he does commit it, it is a killing by him who thus counsels or assists. (*e*)

(*e*) Vaux's C., 4 Repts. 44, (*b*); 1 Hale, 431; 1 Russell, 424–29; 4 Blk. Com. 188; 1 Chitty, 726; Dyson's C., R. & R. 523. Bowen's C., 13 Mass. R. 356. The annotator in Wheeler's C. C. 231, appears to

doubt this principle, but, it would seem, without any ground in reason or authority. Bowen's case is at any rate decisive as to the common law of this commonwealth. In New York, the adviser is guilty of manslaughter only, (2 R. S. 661 § 7). In most of the foreign codes, he is punished as guilty of an offence less than murder.

Where the hurt done is of a dangerous character, and the efficient cause of death, although there be a predisposing habit or condition of body, without which it would not have been fatal, it is, nevertheless, a killing by means of such hurt. (*f*)

As if one, infirm from age or sickness, die of blows which would have done little injury to another of ordinary strength or health, it is a killing by him who gave the blows. (*g*)

(*f*) Martin's C., 5 C. & P. 128; Ramsay's C., 1 Hume, 183; 1 Hale, 128, where lord Hale says that he has often heard that wise and learned judge, Mr. Justice Rolle, so direct; 1 Russell, 429; Archbold, 319; Roscoe, 544–6, quotes Alison, 149; Davis's Cr. Law, 94. The ruling of Hallock, B. in the case of Johnson, at nisi prius, York Ass. 1827, of which there is a meagre report in Lewin's Crown Cases, 164, would seem to be in conflict with this principle. There the defendant was indicted for killing the deceased while in a state of intoxication by a blow, which the physician testified might not have produced death if the party had been sober. Hallock, B. directed an acquittal, observing, that "where the death was occasioned partly by a blow, and partly by a predisposing cause, it was impossible to apportion the operations of the several causes, so as to be able to say with certainty that the death was immediately occasioned by any one of them in particular." The commissioners believe, that the doctrine thus laid down and applied to the case then on trial, cannot be the law. It is entirely at variance with the principle established by the previous authorities, and stated in the text; for it would be as applicable to any other predisposing cause, the infirmity of age and sickness, for instance, as that of intoxication. Roscoe questions the correctness of the decision, and it has no where, that the commissioners can see, any support in reason or authority. A case, involving the same question, was before the S. J. C. of this commonwealth, (Suffolk, Jan. 1817,) but the report of it (in pamphlet,) does not enable us to state very precisely, the opinion of the court. Phillips, the deft. was indicted for the murder of Denegri, by striking him on the head with a logger-head, which produced an inflammation of the brain, of which he died. The physicians agreed in their testimony, that the blow was the immediate cause of the inflammation, which resulted in death; but that this inflammation was much increased, and perhaps rendered fatal, by the deceased's intoxication, at the time of the blow, and his subsequent exposure. The court seems to have ruled, (see charge of Parker, C. J. p. 16,) that upon these facts, there was a sufficient killing, and the deft. was convicted and executed.

This question has been much discussed in other countries, and at different periods, and the doctrine of the text has been almost universally supported.—Such was the Aquilian law as to what should be

deemed a killing, D. 9, 2, 7, § 5; Pothier's Pand. 9, 2, No. 4; for "that may be fatal to one, which is not so to another," and it is sufficient, if the injury be mortal in the particular case,—so in Tittman's Compendium of the common criminal law of Germany, (published in German, 1822,) it is said, "wounds may be mortal, either, first, generally, or secondly, only in the particular instance, according as they would always produce death, upon every human being, or only do so, in consequence of the peculiar bodily condition of the individual; as where the imperfection or peculiar condition of the body, gives to the wound a greater opportunity to become fatal. As for example, where there is an unnatural organization or defective structure of the body: or a particular weakness of any internal or external part, as of the heart or skull; or where the fluids of the body are corrupted; or where there are particular states of the body, as where the deceased is sick or pregnant, or of an advanced or tender age, or the stomach is unduly distended or the like;" and it is held to be equally a killing, whether the wound be such as produces death in the particular case, or such as would always and necessarily be fatal to all. See also Feuerbach's Compendium of the common penal law of Germany, (12th ed. 1831,) 208, pp. 194, and note (*b*) by Mittermaier. Similar provisions exist in most of the foreign codes. Thus, in that of Saxony, (promulgated March 30, 1838,) it is provided, (ch. iv. art. 120,)—"In reference to the crime of killing, it is of no consequence to the legal adjudication of the mortality of the injury, whether a similar injury might not in other cases be cured by the aid of skill; whether the fatal event might not have been averted by the timely application of proper means;—whether the injury was such as would have been, in general, mortal, or occasioned death in the particular instance, *only by the peculiar state of the body of the deceased.*" So in the project of a code for the Grand Duchy of Baden, (by Mittermaier, 1838) part ii. title 10, § 178. "Every injury is to be considered mortal, which has as the acting cause in the particular case produced death, without any distinction as to whether the fatal result might not have been, in other cases, averted by the help of art; whether even in the present proper means would not have prevented it; whether the injury, immediately, or through other intervening causes growing naturally out of it, has produced the death; whether the injury would have been, in general, mortal, or was so in the particular instance only, *on account of the peculiar bodily condition of the individual, or the accidental circumstances, under which it was committed upon him.*" The same principle is contained in the Revised Penal Code of Bavaria, (1827,) ch. xiv. art. 204; Criminal Code of the Canton of Basle, (1835,) title iii. A. § 118; project of Criminal Code of Norway, (1835,) ch. xiv. § 28; of Wurtemburg, (1836,) title ii. ch. 1, art. 223; of the kingdom of Hanover, (1830,) § 224; of the Grand Duchy of Hesse, title 32, art. 216, and in several others.

(*g*) Ramsay's C.; Martin's C., above cited.

Where the hurt done is adequate to and does produce death, it is a killing by him who caused the hurt, although it appear, that, by the use of proper care, or more skilful means, a recovery might have been effected. (*h*)

Thus if a wound be given, which opens an artery, and the man

die from the loss of blood, it is a killing by means of the wound, though by ordinary diligence in procuring a surgeon, the wound might have been staunched and life preserved.(*i*)

And this is so, though the hurt be not directly, if it be naturally and efficiently, the cause of death.

As if a wound, though from neglect, turn to gangrene or induce fever, which is the immediate cause of death, it is a killing by him, who gave the wound.(*j*)

(*h*) Reeve's C. Kely. 26; Edgar's C. Roscoe, 573; quotes Alison, 149; 1 Burnett, 551; 1 Hale, 428; 4 Blk. Com. 197, note 30; 1 Hawk, 119; 1 East, 344; 3 Chitty, 726; 1 Russell, 428; Archbold, 319; 1 Hume, 184; 4 Starkie's Ev. 1; Wheeler, C. C. 264; Greene's C. Ashmead's R. 289; Davis, Cr. L. 94; Liv. 437.

(*i*) 1 Hume, 184, Edgar's C. above cited; Roscoe, 575.

(*j*) 1 Hale, 428; Reeves's C. above cited; 1 Russell, 428; Archbold, 319.

But where the hurt done is not, in itself, either directly or mediately the efficient cause of death, but other positive and substantive agencies intervene;—

as where an injury, not adequate in itself to produce death, is made the occasion of death by means of injurious treatment or noxious medicines, it is not a killing by him, who caused the hurt.(*k*)

Thus where one by violence dislocates the arm of another, and an ignorant pretender operates upon the arm for several days, and a white swelling ensues, in consequence of the operation, which proves fatal, it is not a killing by means of the first violence.(*l*)

(*k*) See citations in note,(*h*) supra. This part of the principle is somewhat ambiguously stated by the different authors and judges, and with many variations in phraseology. We have not followed either of them literally, but have endeavored to extract from a consideration of all, the true doctrine of the law, having regard as well to the reasonableness of the rule, as the authority by which it may appear to be supported.

(*l*) Macowan's C. Roscoe 573.

So if death be owing to any incidental and supervening misfortune, which could not have been foreseen, having an accidental and remote connexion only with the hurt, it is not a killing by means of such hurt.(*m*)

Thus where one, on account of a wound given, is sent to a hos-

pital, where he takes the erysipelas by infection and dies of it;—here, though he would not have gone to the hospital, and so taken the erysipelas, but for the first injury, yet it is no killing by him, who gave the wound.(*n*)

So where one strikes another, injuring him seriously but not mortally, and the latter is in consequence placed upon a table or stool for examination, and he accidentally falls from the table or stool, and dies in consequence of the fall, it is not a killing by the first.(*o*)

(*m*) Wrigley's C. Lew. C. C. 171; Campbell's C. Roscoe, 575; quotes Alison, 347.

(*n*) Campbell's C. above cited.

(*o*) Wrigley's C. above cited.

But where no agency, excepting such as occurs in the natural course of things, and has its efficacy by reason of the hurt, or the act of him, who gave it, intervenes between the hurt and the death, it is otherwise:—

as where robbers give a wound to one, not mortal under common circumstances, and leave him disabled from the injury by the roadside, exposed to the cold, and the wound is thus made fatal, it is a killing by the robbers.(*p*)

(*p*) Caldwell's C., Burnett, 552, in Roscoe, 576.

No person can be adjudged, by any act or omission, to have killed another, unless death ensue within a year and a day from the hurt done; in the computation of which period of time, the whole of the day, on which the hurt was done, is included.(*r*)

(*r*) 3 Inst. 53; 1 Hawk, ch. 31, § 9; 1 East, 343–4; 1 Russell, 428; 4 Blk. Com. 197; 3 Chitty, 726; 2 Deacon, 899; Davis, Cr. L. 95. The reason of this rule arises from the danger of connecting, as cause and effect, events, remote from each other in point of time.

The commissioners have not thought it necessary, either here or in any other part of the code, to introduce any particular rule, as to the proof of what is called the *corpus delicti*, i. e., the proof of the fact of the killing. The law fixes the rules, as to the *competency* of evidence, but what ought to be considered *sufficient* proof in any given case, is generally matter of *fact* to be decided by the jury, in each instance, on its own circumstances, rather than of positive, legal, regulation. Some writers suppose that the finding of the body of the deceased, is the only sufficient evidence of the fact of the killing.

Lord Hale, with that humanity which is one of the best elements of his truly great character, and which nobly distinguishes him among the great criminal lawyers of England, says, (2 Hale, 290,) "I never would convict any person of murder or manslaughter, unless the fact were proved, *or at least the body found*," and he cites two cases of persons convicted on circumstantial evidence, of the murder of others, who were supposed to be dead, but afterwards proved to have been living. The case of the Bournes, of Manchester, Vt., convicted on circumstantial evidence and their own deliberate confession, of the murder of Colvin, who it is said was proved to have been living, (Bennington county, Oct. 1819,) is of the same character, and has often been referred to, in illustration of the danger of such convictions. The passage from lord Hale, is copied without remarks by Blackstone, 4 Com. 358; Deacon (1 vol. 442,) and Chitty speaks of it (1 Chitty, 563,) as "a good *general* rule." Russell quotes it, and adds, (1 Russell, 473,) "But this rule it seems must be taken with some qualifications; and circumstances may be sufficiently strong to show the fact of the murder, though the body has never been found." See also Archbold, 124.

In Hindmarshe's case, (2 Leach, 571,) the prisoner, a sailor, was charged with having killed his captain with a club, and thrown him overboard, at sea. Garrow, for the prisoner, claimed his acquittal, on the ground that there was no proof of the death of the captain, and mentioned a case as having been tried before Mr. J. Gould, where the two prisoners were seen to strip a child and throw it into the dock, and its body was not afterwards seen. The learned judge observed, that it was possible "the tide might have carried out the living child," and the jury upon this ground acquitted the prisoners.

The court in Hindmarshe's case admitted the general rule stated by Garrow, but according to the report, left it to the jury to find whether the deceased was not dead, before his body was cast into the sea. They convicted the prisoner, and all the judges approving the conviction, he was executed.

The opinion of Gould, J., in the case stated by Garrow, (and his statement is the only authority for the case) might have been influenced by the allegations of the indictment, as to the *place* and manner of the death; for the judge does not intimate that there was not evidence of the death of the child, to go to the jury, but the ground seems to have been that there was not sufficient evidence that it died "*in the dock*," (as the allegation probably was,) "as the tide, which ebbed and flowed there, might have carried out the living infant."—(See 1 Russell, 473, note I.) In the other case, also, the ruling might have depended upon the pleadings. In neither is any general doctrine so laid down in the report, that much reliance can be placed upon it.

There have been three cases certainly before the circuit court of the U. S. for the district of Massachusetts, of trials for murders on the high seas, where this supposed principle has been disregarded or denied by the court. (The case of Williams and others, tried Dec. 1818, and reported in pamphlet; Freeman's C. 4 Mason's R. 505; and the very recent case of Gibert and others, (the pirates,) 2 Sumner's Reports, 19.)

In the last mentioned case, Mr. Justice Story said, "This proposition" (that a conviction cannot take place, where the body is not found) "cannot be admitted as correct, in point of common reason, or of law, unless courts of justice are to establish a positive rule to

screen persons from punishment, who may be guilty of the most flagitious crimes. In the case of murders committed on the high seas, the body is rarely, if ever, found: and a more complete encouragement and protection for the worst offences of this sort could not be invented than a rule of this strictness. It would amount to a universal condonation of all murders committed on the high seas." The same reasoning would apply, where the murderer burnt or otherwise destroyed the body.

Starkie says, (4 Starkie, 944,) "Although it be certain, that no conviction ought to take place, unless there be most full and decisive evidence as to the death; yet it seems that actual proof of the finding of the body is not absolutely essential, and it is evident, that to lay down a strict rule to that extent might be productive of the most horrible consequences."

Professor Davis, also, in his work on the criminal law of Virginia, (p. 92,) bears most decided testimony against the rule.

Upon the whole. the commissioners are of opinion, that the proposition of lord Hale, certainly as it has been generally understood, has not been established as an inflexible principle of law, and that it would be unsafe to adopt a rule as applicable to all cases, which is fitted only for a class of them, however large, and which would exempt from punishment every murderer, who should conceal or destroy the murdered body. Undoubtedly, in many cases, the fact, that the body has not been found, would have and ought to have a decisive influence; in others, as where one already rendered helpless, but still living, is thrown into the sea, it would have, probably, little weight; but in all, the question of what is sufficient evidence to prove the death, (and it must be established beyond all reasonable doubt,) should be left, without the restraint of artificial rules, to the understandings and consciences of the jury.

2. THE KILLING MUST BE OF A HUMAN BEING.

Any one, belonging to the human species, alive and in being, of whatever age or condition, may be the subject of murder, (*a*) though he be an idiot or insane person, (*b*) an alien enemy, (*c*) convicted of a capital crime, (*d*) or struck with a mortal disease. (*e*)

(*a*) 1 Hale, 428; Archb. 319; 3 Inst. 49; Feuerbach's Comp. (12 edit. 1836,) § 207.

(*b*) Daft Jamie's C. 1 Hume, 275.

(*c*) 1 Hale, 433; Inglis's C. 1 Hume, 275; Maxwell's C., *ibid.*

(*d*) Bowen's C. 13 Mass. R. 356; in this case the deceased was to have been hung the next day. Vin. Abr. Murder, B. 3.

(*e*) Martin's C., 5 C. & P., 128; Jean Ramsay's C., 1 Hume, 267.]

The life, which is destroyed, must be complete by the birth of the person deprived of it. (*f*)

A child, in its mother's womb, is not in being, nor is it born, so as to be the subject of murder,(g) until its whole body is brought into the world,(*h*) and it has an independent circulation.(*i*)

But if a child be born alive and then die, in consequence of potions administered, or violence done before its birth, or during its birth, it is the killing of a human being.(*j*)

(*f*) Liv. 346; 1 Hale, 433; Roscoe, 565; Davis Cr. Law, 97, and authorities, *infra*.

(*g*) The law was formerly otherwise. Bracton said that it was murder, to destroy a child in the womb of the mother, if it was formed, and especially if it had quickened there; and the contemporary writers support the same opinion, (Bracton l. 3 f.; Fleta, B. 1, ch. 23, § 10, 11, 12,) although the contrary is now well settled in conformity with the statement in the text. (See citations in note *f*.) The question seems to have been much discussed by the philosophers and lawyers of Rome, (Poth. Pand. 48, 8, No. 5,) as it has also been by the writers of the common law of the continent of Europe. Tittman's Compendium, § 145. And the better opinion would seem to have been, with both, that the destruction of a child in the mother's womb, after it had quickened there, was the killing of a human being.

(*h*) Enoch's C. 5 C. & P. 329; Brain's C. 6 C. & P. 344.

(*i*) Pulley's C. 5 C. & P. 539.

(*j*) The commissioners have here stated the common law as they believe it to exist. There are no cases in the American, and but two, which they find in the English books upon the subject. The earliest is a case before Sir G. Scrope reported in the Year books, (1 Edw. 3, 23, pl. 18.) See it in full, 24 Eng. C. L. Repts. 447, note,(*a*.) There the defendant had beaten a woman, pregnant with two children. One of them was dead born; the other was born alive, and baptized, but died two days after the injury, in consequence (as was charged,) of the beating of its mother before its birth. The judges held that the defendant was not guilty of a felony, (murder or any homicide,) but of a misdemeanor only.

The doctrine of this case is maintained by lord Hale, (1 Hale, 443,) and Sir Geo. Staundford, (Staund. 21.) But lord Coke denied it to be the law, and insisted "if a child be born alive, and dieth of the potion, battery or other cause, which happened before its birth, it may be murder," (3 Inst. 50–1,) and quotes Bracton, who goes, as we have seen, much further, (see note *g*,) he maintaining that it may be murder to destroy a formed child in the mother's womb, certainly if it have quickened there. In Gould, 176, pl. 110 Coke, Fenner and Popham, Js. are said to have ruled, that if one "beat a woman great with child, and after the child is born living, but hath signs and bruises on his body, received by the said battery, and after die thereof, this is murder (homicide,) and the difference is where the child is born dead, and where it is born living, for if it be dead born, it is no murder (homicide,) for *non constat*, whether the child were living at the time of the battery or not, or if the battery was the cause of the death."

The opinion of lord Coke has been followed, by nearly all the later writers upon the criminal law, and the authority of the case in the Year-books, has been for a long time much impaired, if not entirely overthrown. 1 Hawk. ch. 31. § 16; 4 Blk. Com. 198; 1 East, ch. 50, § 14; 3 Chitty, 727; Archbold, 320; 1 Russell, 424, and note; 3 Chitty, 727; Roscoe, 565; Davis's J.. 311.

A very recent case in England has removed all doubt as to the common law of that country.—(Senior's C., Moody's C. C. 344.) Joseph Senior was convicted of manslaughter (homicide) before Bolland, B. at the Chester spring assizes, 1832, for inflicting a wound upon a child, during its birth, but before it had breathed, and while it was still in *ventre sa mere*. The case was afterwards submitted to the twelve judges, who unanimously held the conviction right.

The commissioners find that child-murder, and especially the killing of illegitimate children, has been the subject of particular provisions in many of the foreign codes, the killing during birth, and within twenty-four hours afterwards, being put on the same ground and punished as an offence less than murder. They do not find, however, any provision as to the death of a child, after birth or twenty-four hours after birth, on account of an injury previously received.

The books of the Scottish law, so abundant in illustration of most of the principles relating to murder, contain, so far as the commissioners know, no cases upon this point. Hume quotes the doctrine from Hawkins, and adds, "but it is difficult to imagine (and no more needs be said in such a case,) that in these circumstances, a decisive proof can be obtained of the true cause of the death of the child." It will be seen also, that the difficulty of proof had great weight with Lord Hale and Sir George Staundford.

3. THE KILLING MUST BE UNLAWFUL.

Every killing of a human being, which, &c.

To ascertain what constitutes murder, it remains to be explained what is an "unlawful," and what a "malicious" killing.

ERRATA.

Page 6, line 17, after "what," read "code."
" 9, " 12, for "break," read "breaks."
" 20, " 29, for "this," read "that."
" 21, " 6, for "constitution," read "condition."
" 22, " 8, for "report," read "reports."
" 30, " 13, for "unflexible," read "inflexible."